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Supreme Court of the United States

_____ TERM, 1955

No. 304

WILLIAM H. ELLISON,

Petitioner

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILLIAM H. ELLISON,
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vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioner, WILLIAM H. ELLISON, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals No. 15,338, entered on June 15, 1955, reversing a certain judgment of the United States District Court for the Southern District of Florida, entered on April 19, 1954 (Tampa Civil No. 2348), and directing the United States District Court to enter a judgment for the Appellant (Respondent herein).

I

STATEMENT OF OPINIONS BELOW

There is no official or unofficial report of the judgment of the United States District Court for the Southern District of Florida, entered on April 19, 1954; and, the judgment of the Court of Appeals, entered on June 15, 1955, has not yet been reported, and this Petitioner submits, with this Petition, nine (9) copies of the record, as printed for the Court below, in which both the opinions of the District Court and the Court of Appeals are contained, together with Petition for Rehearing, timely filed, on July 2, 1955 and Order Denying said Petition, entered on July 12, 1955. A Petition for Stay of Mandate was filed and on July 22, 1955, an Order Staying the Mandate was entered, which Order provided that within thirty (30) days from the date thereof, there should be filed with the Clerk of the Court of Appeals, a certificate of the Clerk of the Supreme Court that Certiorari, Petition and Record have been filed.

II

STATUTORY JURISDICTION

The statutory provision, upon which the jurisdiction of this Court is sustained, is Title 28 U. S. C. 1254, June 25, 1948, C646; 62 Stat. 928. Section 1254, Title 28 U. S. C. clearly confers jurisdiction upon this Court to bring up a case of this character from the Court of Appeals by certiorari, and sub-paragraph (b) of Section 1 of Rule 19 of this Court clearly recognizes this right.

III

QUESTIONS PRESENTED FOR REVIEW

(a) The Court of Appeals, in its judgment reversing the judgment of the District Court, on its interpretation of the facts and directing the District Court to enter judgment for the Appellant, deprived the Petitioner of the right to take a non-suit, which, under applicable Florida law and under the Seventh Amendment to the Constitution, is absolute.

(b) The Court of Appeals has decided an important question of disability insurance in a way which is in conflict with the applicable State law.

(c) The decision of the Court of Appeals is in conflict with the applicable laws of Florida relating to the presumption of the correctness of the trial judge in the findings of fact.

(d) This Court has not directly passed upon a direction, by the Court of Appeals to the United States District Court, that it enter a Final Judgment against a Plaintiff who had recovered Final Judgment in the District Court, and this is an important question of Federal law that should be passed upon by this Court.

(e) The decision of the Court of Appeals violated the provisions of Rule 52 (a) of Rules of Civil Procedure in that:

1. It did not give the findings of the trial court the benefit of all favorable inferences which could reasonably be drawn from the evidence, when the findings of the trial court were not clearly erroneous, and therefore this decision is in conflict with the ruling of other courts of appeal.

2. In that it denied the trial Judge the right and privilege of determining the credibility of witnesses.

IV

RULE INVOLVED

Rule 52 (a) reads as follows:

"(a) EFFECT: In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusion of law appear therein."

V

STATEMENT OF CASE

(showing Federal jurisdiction)

Suit was entered in the Circuit Court of Pinellas County, Florida and was removed to the United States District Court, by reason of diversity of citizenship. Suit was for the enforcement of the permanent disability provisions of an insurance policy. After lengthy testimony, taken before the Court, without a jury, a Final

Judgment was rendered for the Petitioner (R 486) upon findings of fact by the District Judge (R 468-475) inclusive. Motions for a New Trial and for Judgment Non Abstante Verdicto were made and denied. The evidence showed that the Petitioner, who, for approximately twenty (20) years, had engaged exclusively in the field of osteopathy and rectal surgery, was now wholly unable to do any work in said occupation, which was the only occupation in which he was qualified; that he had attempted to work, and did work for some four to five years after the inception of the disease on his hands, but due to total disability of his hands, he had been forced to discontinue his profession and he had not worked for four years prior to the time he was informed that he had disability provisions in his life insurance policy (R 129). This notice came to him several months before his sixtieth birthday, by a notice from the insurance company that his insurance premiums would be reduced proportionately because of the fact that they would no longer carry the disability provision of his policy.

The Court of Appeals took issue with the District Court, on its findings of fact, and took the opinion-testimony of Dr. Wilson, a witness for the respondent, who testified that, based upon his study and treatment of Petitioner's hands in 1951 and 1953, he would say that Petitioner could not carry on any massage or surgery, or drive an automobile (R 245-246), but he expressed the opinion that the condition could be healed.

The Court of Appeals accepted this opinion-testimony, although the record shows that after Dr. Wilson's treatment, the condition of Petitioner's hands worsened, and also shows that said Petitioner had gone to a great

extent to cure himself, and also shows that Petitioner, by extensive reading of texts on dermatology, was qualified as a Dermatologist.

The Court of Appeals premised its reversal of the District Court upon the opinion-testimony of Dr. Wilson, a hostile witness, that Petitioner could be cured, and upon the fact that the Petitioner had not made an effort to seek other employment.

VI

ARGUMENT

(a) THE COURT OF APPEALS, IN ITS JUDGMENT REVERSING THE JUDGMENT OF THE DISTRICT COURT, ON ITS INTERPRETATION OF THE FACTS AND DIRECTING THE DISTRICT COURT TO ENTER JUDGMENT FOR THE APPELLANT, DEPRIVED THE PETITIONER OF THE RIGHT TO TAKE A NON-SUIT, WHICH, UNDER APPLICABLE FLORIDA LAW AND UNDER THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION, IS ABSOLUTE.

The Petitioner, under Florida law, has the absolute right to take a non-suit, when informed that a verdict is to be directed against him.

National Broadway Bank of City of New York vs Leslie, 31 Fla. 56; 12 So. 525

Pitt vs Abrams 103 Fla. 1022; 139 So. 152;

Kidd vs Cox (Fla.) 40 So. 2nd 454.

Cone vs West Virginia Pulp & Paper Co. 91 Law Ed. 849; 330 U. S. 212 (decided by this Court).

At common law, a waiver of a jury only applies to the first trial. *Regan vs Moore,* 242 Ill. 256; 89 N. E. 992. The plaintiff's right, after a trial, to take a nonsuit, is the same as though there had been no trial.

(b) THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF DISABILITY INSURANCE IN A WAY WHICH IS IN CONFLICT WITH THE APPLICABLE STATE LAW.

The cases relied upon by the Court of Appeals demonstrate that the Court did not follow the Florida rules. The record shows, from the testimony of Dr. Wilson, an adverse witness, that the Petitioner had infectious eczematiod dermatitis (R 209) and chronic eczematoid eruption (R 212) and was suffering from a fungus infection (R 208. 240); that the said adverse witness, who is a dermatologist, had prescribed for this condition; and, based upon his two examinations of the Petitioner, this adverse witness testified that said Petitioner was totally disabled from performing his profession (R 224).

The record shows that the insurance policy in question was taken out by the Petitioner, as a practicing osteopathic physician, on September 30, 1928. The terms of the policy are shown in the record at Page 22, and Section 3 of said policy provides, in part, as follows:

> "TOTAL DISABILITY: Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation.
>
> "SPECIFIED DISABILITIES: The entire and irrecoverable loss of the sight of both eyes or of the use of both hands or feet or one hand and

one foot, will be considered total and permanent disability".

The law of Florida is set up in the following cases:

New England Mutual Life Insurance Co. vs Huckins, 127 Fla. 540; 173 So. 697.

New York Life Ins. Co. vs Bird, 152 Fla. 332; 12 So. 2nd 454.

Equitable Life Assurance Soc. vs McKeithan, 119 Fla. 486; 160 So. 883;

Equitable Life Assurance Soc. vs Wiggins, 115 Fla. 136; 155 So. 327.

In the *McKeithan* case, the Florida Supreme Court said that disability means the inability on the part of the insured to do substantially all of the material acts necessary to the insured's engaging in an occupation for remuneration or profit, taking into consideration his mental and physical capacities to do so, if he so wished.

The Court of Appeals, without any evidence before it that the Petitioner could engage in any occupation other than his chosen one, considering the state of his hands, drew an inference from the opinion-testimony of Dr. Wilson, an adverse witness, that the Petitioner could engage in some gainful occupation, for which he was wholly untrained.

The Florida Supreme Court, in *New York Life Insurance Co. vs Bird,* 12 So. 2nd 454 (supra) expressly rejected such contention. In that case the defendant below had asked for the following instruction:

> "Even if you find that the plaintiff is physically unable to continue the regular work of his customary occupation, he is not totally disabled, if, with reasonable effort and success, he can engage in some other gainful occupation with reasonable regularity".

This instruction was refused, and the Supreme Court of Florida upheld the refusal of this instruction and held that the proper instruction, which was given, was:

> "In determining whether or not the plaintiff is totally disabled, the proper question is not whether he can do substantially all of those things he did involving a gainful occupation; but whether or not he can substantially perform the duties of some occupation for which he is qualified".

In that case, the Florida Court also said:

> "The Florida rule of interpretation is that the policy of insurance, like other contracts, must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, the claim to the indemnity which the policy protects. See National Surety Co. vs Williams, 74, Fla. 446, 77 So. 212".

To the same general effect are the other Florida cases, cited above; and the Florida courts' decisions that his education, training and work in a gainful occupation or employment, in a customary manner, should have been the ruling decisions in fixing the guideposts of his ability to earn a livelihood.

(c) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE LAWS OF FLORIDA RELATING TO THE PRESUMPTION OF THE CORRECTNESS OF THE TRIAL JUDGE, IN THE FINDINGS OF FACT.

The Florida rule is that a verdict will not be disturbed where the evidence is such that reasonable men might have come to the same conclusion, and the appellate court should give careful consideration to the evidence in its most favorable aspect to the party prevailing. *(City of Miami vs Miner* 169 So. 609; 124 Fla. 682).

In the case of *Motor Transit Company vs Driver,* 162 So. 883; 120 Fla. 293, and in *Parrish vs Clark,* 145 So. 848; 107 Fla. 598, the Supreme Court of Florida laid down the rule that where the court or jurors might have returned a different verdict, this will not warrant a reversal where the verdict is not against the manifest weight of the evidence.

In *Saffold Bros. Produce Co. vs Winn & Lovett's Grocery Co.* 149 So. 1, the same rule was applied to the findings of fact of a Chancellor.

In other words, the rule of Florida is that the judgment of the lower court cannot be set aside unless it is clearly erroneous and it is entitled to every presumption in its favor.

(d) THIS COURT HAS NOT DIRECTLY PASSED UPON A DIRECTION, BY THE COURT OF APPEALS TO THE UNITED STATES DISTRICT COURT, THAT IT ENTER A FINAL JUDGMENT AGAINST A PLAINTIFF WHO HAD RECOVERED A FINAL JUDGMENT IN THE DISTRICT COURT, AND THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE PASSED UPON BY THIS COURT.

In *Stewart vs Southern Ry. Co.* 86 L. Ed. 849, the Appeals Court held that there was no substantial evidence to sustain the verdict and reversed and remanded, with direction to render a judgment for the respondent.

Certiorari was granted in that case and this Honorable Court said that a new trial should have been ordered and reversed the ruling of the Court of Appeals.

In *Cone vs West Virginia Pulp & Paper Co.* 330 U. S. 212; 91 L. Ed. 849, in construing Rule 50 (b), this Honorable Court said that the rule permits a trial judge to exercise his discretion to choose between the two alternatives of either ordering a new trial or rendering a judgment sustaining the verdict. This Court said that to determine whether a new trial should be granted or judgment entered, calls for the judgment, in the first instance, of the Judge who saw and heard the witnesses and had the feel of the case, which no appellate transcript can impart.

To the same effect is the holding in *Globe Liquor Co. vs San Roman* 332 U. S. 571; 92 L. Ed. 177.

Reviewing courts have emphasized the importance of conclusions of the trial judge, which derive from his opportunity to pass upon the credibility of the witnesses and have declined to resolve a conflict in the testimony.

Grau Brothers vs C. I. R. CCA 9th 173 Fed. 2nd 170.

(e) THE DECISION OF THE COURT OF APPEALS VIOLATED THE PROVISIONS OF RULE 52 (a) OF RULES OF CIVIL PROCEDURE IN THAT:

1. IT DID NOT GIVE THE FINDINGS OF THE TRIAL COURT THE BENEFIT OF ALL FAVORABLE INFERENCES WHICH COULD REASONABLY BE DRAWN FROM THE EVIDENCE, WHEN THE FINDINGS OF THE TRIAL COURT WERE NOT CLEARLY ERRONEOUS, AND THEREFORE THIS DECISION IS IN CONFLICT WITH THE RULING OF OTHER COURTS OF APPEAL.

2. IN THAT IT DENIED THE TRIAL JUDGE THE RIGHT AND PRIVILEGE OF DETERMINING THE CREDIBILITY OF WITNESSES.

The Court of Appeals based its decision upon the following:

1. That the Petitioner did not make any effort to find something else to do to earn a livelihood.

2. On his failure to consult a dermatologist.

Volume 2 of Federal Practice and Procedure, Barron and Holtzoff, Rules Edition, Sec. 1133, Page 834, comments on Rule 52 (a) as follows:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence, or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo".
>
> "In considering whether the trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence".

This Court, in the case of *United States vs. U. S. Gypsum Company,* 333 U. S. 364-411; 92 L. Ed. 746, said:

> "The practice in equity prior to the present Rules of Civil Procedure, was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.

In the case of *Nee Collector etc. vs Linwood* (C. C. A. 8th) 174 Fed. (2nd) 434, in commenting upon the *Gypsum Company* case and Rule 52 (a), the Court said:

> "Under Rule 52 (a) and its interpretation in the United States vs Gypsum Company case, there must exist a stronger basis for overthrowing a finding of fact than a mere difference in personal judgment. Such evidentiary weight and such convictional certainty must be present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound survey of, or to accord the proper effect to all of the cogent facts, giving due regard, of course, to the trial court's appraisal of witness credibility, where that factor is involved."
>
> "* * * Reviewing the case, in its own setting and on its own record, as the parties are entitled to have done, an attempt on our part to overthrow the trial court's appraisal of the situation on the evidence before us would, we believe, be more one of difference of personal judgment with the trial court on the facts, than a definite and firm conviction on the whole situation that the court was clearly wrong".

Both Dr. and Mrs. Ellison testified that since 1947, Dr. Ellison, the Petitioner, had been unable to use his hands without discomfort and that the condition aggravated itself upon his doing certain things, such as putting his hands in water, etc.

The record also shows from the evidence of an adverse witness, Dr. Wilson, that the Petitioner was suffering from infectious eczematoid dermatitis (R 209) and a chronic eczematoid eruption (R 212) and was suffering from a fungus infection (R 208-240). This adverse witness, being himself a dermatologist, had prescribed for these conditions on Petitioner's hands, and

this prescription caused Petitioner's hands to get worse. At the time of Dr. Wilson's two examinations of Petitioner's hands, he found the Petitioner to be totally disabled from performing his profession (R 224, 245-246).

This witness testified that if Petitioner used his hands in any manner, other than brushing his teeth and eating, he would suffer discomfort (R 225); that he suffered discomfort in driving an automobile (R 233).

There was evidence that Petitioner had consulted numerous doctors over a period of time; that he was a physician, learned in materia medica; that he treated himself; that he read medical journals and texts on dermatology, and used every new remedy which he could find; in short, that he gave himself full and complete treatment, without avail. The Court of Appeals found that said Petitioner was incapable of treating himself and that he should be penalized for his failure to seek further medical treatment.

The Petitioner testified that he could do nothing without the use of his hands (R 128) and this is sufficiently borne out by the testimony of even the adverse witness.

This evidence is not sufficient to give the appeals court the firm conviction that there was an erroneous finding of fact.

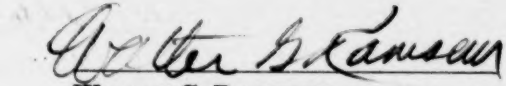
In one breath, the Court of Appeals says that the Petitioner was not capable of treating himself, and that he did not use due diligence in consulting other physicians, such as a specialist, although the record shows that he did consult a dermatologist, who was unable to help him.

In the next breath, the Court of Appeals says that he was capable of earning a livelihood, treating third persons, and was under a duty to do so.

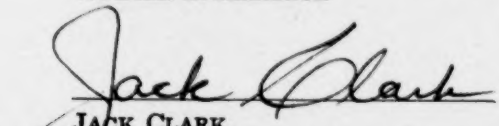
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CONCLUSION

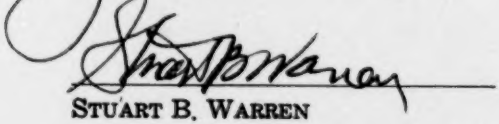
It is respectfully submitted that the questions set forth in Part III of this Petition and argued in Part VI hereof, are questions which merit the consideration of this court.



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CERTIFICATE OF SERVICE

I, the undersigned, of counsel for Petitioner, hereby certify that copies of the foregoing Petition for Certiorari were served upon the Respondent, Mutual Life Insurance Company of New York, by mailing three copies thereof, postage prepaid, to Honorable R. W. Shackleford, of counsel for Respondent, Tampa Theatre Building, Tampa, Florida, on this the 4th day of August, 1955. I further certify that the above named counsel for Respondent has full and complete copies of the record in said cause.

Walter G. Lamar

Attorney for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 304

WILLIAM H. ELLISON,

Petitioner,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The unanimous printed opinion of the Court of Appeals, which has not yet been reported in Federal Reporter, Second Series, is included in the record filed by the Petitioner.

JURISDICTION

Petitioner refers to Title 28 USC 1254 and Section 1 (b) of Rule 19 of this Court as "clearly" conferring and recognizing the jurisdiction of this Court to bring up a case of this character by Certiorari. So far as Rule 19 specifies "the character of reasons" on which Certiorari may be granted, the contrary is true. In the instant case there is, we submit, an entire absence of any one of the five "reasons" specified in Section 1 (b) of Rule 19 as a basis of consideration in granting of Certiorari by this Court.

QUESTION PRESENTED

Whether under the specific facts in the instant case the Court of Appeals acted within the scope of the authority granted to it under Rule 52 (a) of the Federal Rules of Civil Procedure in setting aside as clearly erroneous the findings of fact or conclusion of the District Judge who tried the case without a jury that Petitioner was "totally and permanently disabled" within the meaning of the particular language of the individual contract of insurance here involved.

RULES INVOLVED

Federal Rules of Civil Procedure

Rule 52 (a) reads, in part, as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . As amended Dec. 27, 1946, effective March 19, 1948."

Rule 52(b) reads, in part, as follows:

"... When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

Rule 81(c) reads, in part, as follows:

"These rules apply to civil actions removed to the United States district court from the state courts and govern procedure after removal. . . . If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949."

STATEMENT

This was a suit by Petitioner to recover benefits for total and permanent disability under two policies of insurance issued by Respondent. The disability provisions in both policies provided, in part, as follows:

"Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation." (R. 21).

Respondent, after removing the case to the Federal Court, denied that Petitioner was totally and permanently disabled and in two separate defenses set forth, first, that Petitioner had made no effort whatsoever since the onset of the claimed disability to test his ability to engage in some line of gainful occupation taking into con-

sideration his education, training, experience and his physical condition and, second, that Petitioner was under a duty to avail himself of all reasonable means and remedies to remove or reduce the eczema which was claimed as a total disability but he had failed in this duty.

The facts are carefully summarized by the Court of Appeals on pp. 2-6 of its Opinion. The Petitioner by his own testimony established that, in addition to graduating from high school, completing a two-year business college course, operating a hardware store, serving in the Army and working as a salesman, he had graduated from a four-year course at an Osteopathic College which he testified was equivalent to what an M. D. would receive, including chemistry, research, *et cetera,* the course entitling him to practice general medicine (R. 94-97). Petitioner was forced to admit that since 1947 he had made no effort or attempt whatsoever to work in any line of medicine or business. (R. 128-129).

The petitioner by his own testimony further established that he had never undergone a course of treatment for his hands. Petitioner testified that in the period from 1947 to 1954 during which he claimed to be totally disabled he had, aside from the use by him of free pharmaceutical samples received in his mail (R. 77), only consulted three physicians (R. 120) as follows: he at one time showed his hands in his home to a friend who had retired from a general practice (R. 104-105); later while accompanying his wife to a doctor Petitioner received one X-ray treatment but he did not return (R. 106); and then after filing his claim he made two visits to a dermatologist, one in 1951 and one in 1953, primarily for the purpose of obtaining colored photographs of his hands. (R. 109, 116-119).

As indicated in the Opinion of the Court of Appeals (p. 7) the findings of fact by the trial Court, which were the basis of the Appellate Court's reversal, may be summarized and simply stated as follows:

> 4. That plaintiff took various treatments for the condition of his hands without receiving beneficial effect therefrom.
>
> 5. That the condition of plaintiff's hands constituted the entire irrecoverable loss of use thereof so far as concerned the practice of rectal surgery.
>
> 6. That the plaintiff had been so disabled as not to be able to engage in his own or any other gainful occupation.
>
> 11. That the plaintiff became totally and permanently disabled prior to May 1, 1947, and continued so disabled to the date of the trial.

By detailed reference to appellee's own testimony, quoted verbatim and at length in its opinion, the Court of Appeals demonstrated the clear error in the findings of the trial Court referred to above. It emphasized that there was "nothing here to support the Court's findings that 'plaintiff took various treatments for the diseased condition of his hands without receiving any beneficial effect from such treatment.'" (p. 17). It pointed out that the finding of irrecoverable loss of use of both hands could not be sustained in the light of the quoted portions of testimony by plaintiff himself negativing the fact that he had "availed himself of all reasonable means and remedies to remove his disability." (p. 17).

Summarizing the basis of its rejection of the key findings of fact made by the trial Court, the Court of Appeals stated (p. 18):

"Findings Numbers 6 and 11 to the effect that from May 1, 1947 to the date of the suit plaintiff had been so incapacitated that he could not, within range of his normal ability, taking into consideration his education, training and work and his physical condition, earn wages or profits in his customary profession nor engage in any gainful occupation in a customary manner, and thus was permanently and totally disabled under the terms of the policies were without evidence to support them. This is so, first, because there can be no finding of such disability in the absence of the willingness to avail himself of means to remove his disability, as discussed above, and second, because Ellison made not the slightest move to find an occupation or employment."

Since the Petitioner by his own testimony had precluded his recovery and since, therefore, no advantage would result from a new trial, the Court of Appeals reversed and remanded with instructions to enter judgment for Respondent.

ARGUMENT

There is nothing in this case which would warrant review by this Court on certiorari. Not only is the result reached by the Court of Appeals correct but also there is no conflict between the decision below and any other Federal or Florida decision. There is no important question of Federal law involved. In short, this is merely a contract case involving the application of certain specific facts to the language used in this particular insurance policy. In the next case the facts and language will be different. A decision by this Court in this case would be of value only in this case. The appellate review provided by statute has already been given to the litigants by the Court of Appeals.

I.

The Decision Below Is Clearly Correct

The Court of Appeals set aside certain findings of the District Court under Rule 52(a) of the Federal Rules of Civil Procedure. The Supreme Court in *United States v. United States Gypsum Company,* 333 U S 364, in setting aside as clearly erroneous the findings of fact of a District Court at page 395 said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The insurance policies sued on did not undertake to assure Petitioner that he could continue to practice as a rectal surgeon. The law of Florida is stated in a trial court instruction approved by the Supreme Court of Florida in *New York Life Insurance Co. v. Bird,* 152 Fla. 532, 12 So. (2d) 454, at p. 457:

> "If you find that the plaintiff, within the range of his normal ability, taking into consideration his education, training and physical condition, can perform some work, follow some occupation or engage in some business for remuneration or profit, you should find a verdict for the defendant insurance company."

The Florida decisions also establish that Petitioner was under a duty to avail himself of all reasonable means and remedies to remove or reduce the eczema which was claimed as a total disability. The Supreme Court of Florida in *Mutual Life Ins. Co. of N. Y. v. Knight,* 130 Fla. 733, 178 So. 898, at p. 900 held:

> "It is the duty of one suffering from causes that disable him to avail himself of all reasonable means and remedies to remove his disability, . . ."
>
> *Cf. Pacific Mutual Life Ins. Co. of California v. McCaskill,* 126 Fla. 82, 170 So. 579.

It is significant that Petitioner has not cited or attempted to distinguish these two Florida decisions which were relied upon by the Court of Appeals on pages 9-10 of its Opinion and Petitioner has cited no Florida decisions to the contrary.

Respondent respectfully submits that it is impossible for a careful study of the record not to leave the reader with "the definite and firm conviction" that a serious mistake was made by the District Court. There is absolutely no question regarding the correctness of the Court of Appeals action under Rule 52(a) in setting aside the findings which it considered clearly erroneous. This Court cannot attempt to review all of the fact cases which are decided by Courts of Appeals. In non-jury cases this would result merely in this Court substituting its judgment as to what is "clearly erroneous" for what the Court of Appeals had determined to be "clearly erroneous." Under such circumstances this Court should not, and has previously refused to, entertain certiorari. *Orvis v. Higgins,* 180 F (2d) 537 (C. A. 2), *cert. denied,* 340 U. S. 810; *Nee, Collector v. Main Street Bank,* 174 F (2d) 425 (C. A. 8), *cert. denied,* 338 U. S. 823.

II.

There Is No Conflict of Decision.

The Petitioner does not contend that the decision below of the Court of Appeals is in conflict with any decision of this Court. All of the decisions of this Court cited in the Petition, other than the case of *United States v. United States Gypsum Company, supra,* from which Respondent has already quoted, involve jury trials and two of the three said decisions interpret Rule 50(b) of the Federal Rules of Civil Procedure. These cases are not in point because in the instant case there was no trial by jury and it is Rule 52(a) and not Rule 50(b) which is here applicable.

The only two Court of Appeals decisions cited in the Petition involve entirely different factual questions and could not be in conflict.

The petitioner contends in subdivision VI(b) on pp. 7-9 of his Petition that the decision of the Court of Appeals below is in conflict with applicable state law on the question of disability. On p. 8 of the Petition four Florida decisions are cited as setting forth the Florida law of total and permanent disability. Actually Petitioner's presentation of the Florida law concerning disability is incomplete because he fails to call the attention of this Court to the principle set forth in the Florida case of *Mutual Life Ins. Co. of New York v. Knight, supra.* However, it is interesting to note that the four decisions cited by Petitioner are exactly the four decisions which are cited on p. 8 of the printed Opinion of the Court of Appeals and which, together with *Mutual Life Ins. Co. of New York v. Knight, supra,* are accepted by the Court of Appeals as stating the Florida law.

Petitioner in the second quotation on p. 9 of the Petition quotes from *New York Life Insurance Co. v. Bird, supra,* a statement which Petitioner contends represents the Florida law and this same statement is also quoted and accepted by the Court of Appeals on p. 9 of its Opinion. It is obvious that the Court of Appeals has meticulously followed the Florida law. The decision in each of these cases depends upon the particular facts and particular policy provisions. A reading of each of the four cases cited will show that each involves different facts and none is in conflict with the decision below.

Petitioner also claims a conflict with Florida decisions dealing with procedure in subdivision VI(a) on p. 6 of his Petition and in subdivision VI(c) on pp. 9-10 of his Petition. There is no basis for a conflict because, in any event, these procedural aspects of a case removed to the Federal courts on the ground of diversity of citizenship are, as set forth in Rule 81(c) of the Federal Rules of Civil Procedure, governed by the Federal Rules. Thus, the Florida procedural decisions cited by Petitioner under subdivisions of VI(a) and VI(c) are not relevant.

Even if they were relevant, however, there is no conflict between the decision below and the Florida decisions. The Florida cases cited under subdivision VI(a) of the Petition are jury cases in which a non-suit was sought prior to verdict. In the present case the Petitioner did not ask either for a jury trial or for a non-suit. In addition, the cases cited by Petitioner did not involve a preclusive involuntary non-suit. In the instant case, however, the Petitioner by his own testimony has precluded himself from recovering for total and permanent disability in this case or in any retrial of this

case. Actually under Florida law, as shown by *Crews v. Woods,* ——— Fla. ———, 59 So. (2d) 526, a decision more recent than any of those cited in the Petition, Petitioner would have had no right under the facts of this case to take a non-suit. See also *Hartquist v. Tamiami Trial Tours,* 139 Fla. 328, 190 So. 533.

The Florida decisions cited in subdivision VI(c) do not conflict with Rule 52(a) of the Federal Rules of Civil Procedure. Even if Rule 52(a) did not control appeals in non-jury cases in the Federal Court, a reading of the single Florida non-jury decision cited by Petitioner will show that the "clearly erroneous" rule is applied by the state court. The jury trial cases which are cited, of course, are not in point.

Therefore, the decision below is not in conflict with the decisions of any other court.

III.

There Is No Important Question of Federal Law

Petitioner suggests under subdivision VI(a) on p. 6 of the Petition that the Seventh Amendment to the Constitution of the United States is involved. None of his citations support this assertion. In fact, in this case Petitioner waived his right to jury trial and the Seventh Amendment could not be involved. In speaking of Rule 52(a) this Court in *United States v. United States Gypsum Co., supra,* at pp. 394-5 said:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of find-

> ings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' "

Petitioner contends under subdivision VI(d) on p. 10 of the Petition that this case presents an important question of Federal law, that is, whether a Court of Appeals in a non-jury case may direct a District Court to enter a final judgment against a plaintiff who had obtained a judgment in the District Court. The Supreme Court cases cited by Petitioner, however, all involve jury trials and are not in point. For example, in *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, and in *Globe Liquor Co. v. San Roman*, 332 U. S. 571, both cited on p. 11 of the Petition, this Court in interpreting Rule 50(b) holds that where in a *jury* trial the defendant fails to move for a judgment notwithstanding the verdict, then on appeal an appellate court in reversing a judgment for the plaintiff may not direct the lower court to enter a judgment for the defendant. Petitioner, however, fails to call this Court's attention to the many cases holding that where in a *jury* trial the defendant does move for a judgment notwithstanding verdict, the appellate court in reversing a judgment for the plaintiff may direct the lower court to enter a judgment for the defendant. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654 (prior to adoption of Federal Rules of Civil Procedure); *Leader v. Apex Hosiery Co.*, 108 F (2d) 71, 81 (C. A. 3), *aff'd*, 310 U. S. 469; *Home Life Ins. Co. of New York v. Moon*, 110 F (2d) 184, 186 (C. A. 4), *cert. denied* 311 U. S. 659; *Reliance Life Ins. Co. v. Burgess*, 112 F (2d) 234, 240, *cert. denied* 311 U. S. 699.

These Rule 50(b) jury trial cases cited by Petitioner which depend on whether or not defendant has moved for judgment notwithstanding verdict, however, are not applicable to the instant case which is a Rule 52(a) non-

jury case. Rule 52(b) specifically provides that in non-jury cases no such motion is required in order to raise the question of the sufficiency of the evidence to support the findings. Thus, in a non-jury case under the Federal Rules of Civil Procedure, an appellate court has the same mandate authority as it has in a jury case in which the sufficiency of the evidence to support the verdict has been tested by a motion for judgment notwithstanding verdict. *Baltimore & Carolina Line, Inc. v. Redman, supra.*

The mandate of the Court of Appeals in a particular case below without a jury must, of course, depend on the particular situation involved. Petitioner objects to the mandate and claims a right to retry the case, even though, as pointed out by the Court of Appeals, it was Petitioner's own testimony that he made no effort to test his ability to work or to pursue reasonable medical treatment which under the law precluded his right to recover for total and permanent disability under this policy in this case or in any retrial of this case. Unless Petitioner is now to change his sworn testimony, there could be no purpose served in a new trial.

Petitioner in subdivision VI(e) on pp. 11-15 of his Petition is merely asking for a second appellate review of the facts in this particular case. The parties to this contract controversy have already had the appellate review of the case provided by law. Petitioner in his brief refers to certain facts in the record. Certain additional facts are set forth by the Court of Appeals on pp. 5-6 of its Opinion. Still other facts negativing disability and based on uncontradicted evidence in the Record could be set forth by this Respondent. However, it is certainly

of no importance for this Court to restudy all of the facts in this case and then decide whether, if it had been the Court of Appeals, it would have regarded the findings of the District Court as "clearly erroneous."

There is no important question of Federal law involved.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, the undersigned, of counsel for Respondent, hereby certify that copies of the foregoing Brief for Respondent in Opposition were served upon the Petitioner, William H. Ellison, by mailing three copies thereof, postage prepaid, to Honorable Walter G. Ramseur, of counsel for the Petitioner, Ramseur, Bradham & Clark, 601 Florida Theatre Building, St. Petersburg Florida, on this

———— day of September, 1955.

Attorney for Respondent.